

[1] that you just mentioned?

[2] **A.** Yes. Yes. And there is certain -- the radio industry, for

[3] instance, every radio station, the 8,000 radio stations on a

[4] blanket pay as a rate. The music use is not taken into account

[5] for radio. Local television for the blanket is allocated not

[6] on music use but rather on audiences.

[7] So, there is a number of industries like that.

[8] **Q.** If you could look at tab 3 in your binder, and this is

[9] actually a joint exhibit, it is joint Exhibit 1291, could you

[10] identify this, please?

[11] **A.** This is the commercial music service license agreement that

[12] I have been talking about, the standard agreement.

[13] **Q.** When does this -- what is the actual term of this license?

[14] **A.** The standard term was from July of '04 through June 30th of

[15] 2009 or whenever a service, if a service started in '08 we

[16] would have offered this license to them with a very short-term.

[17] **Q.** And so, now that we are in 2010, what is the licensing

[18] status of the industry now?

[19] **A.** The licensing status is that everybody is on an interim

[20] license right now and they're all paying at a rate of \$25 per

[21] location, per year, which was the rate set by this Court back

[22] about a year ago.

[23] **Q.** And why did you offer the rest of the industry the \$25 rate

[24] that was set for this Court for DMX?

[25] **A.** Again, we believed that they're similarly situated to DMX

[1] so we felt it would be inappropriate to offer them any other

[2] rate other than what the Court set for DMX.

[3] **Q.** If you could turn to page 2 of the agreement we are looking

[4] at, in paragraph 5A it describes the base license fee. Could

[5] you just describe what that is for the Court?

[6] **A.** Yes.

[7] The base license fee under this is the initial fee

[8] estimate, it takes the \$36.36 rate per location per year times

[9] the number of locations that an establishment has times five

[10] years. So, using again a simple example, if you took 100

[11] locations times the \$36.36 rate, you would pay us \$3,636 per

[12] year or just about \$18,000 over the five years. That would be

[13] your base fee. That pretty much never changes.

[14] **Q.** And could you explain what happens to that fee if the

[15] number of customer locations change over the term of the

[16] license?

[17] **A.** Sure.

[18] **Q.** And include if it goes down and if it goes up?

[19] **A.** Let's go with down first.

[20] If it drops -- if the number of locations drop --

[21] there is no adjustment to the \$18,000 under the example I used

[22] or under any example. It is the base license fee that the

[23] establishment pays. So in the example I gave a second ago, if

[24] you had 100 locations at the start paying us \$3,636 per year or

[25] \$18,000 over the term and you lost 50 locations, you would

[1] still pay us that \$3,636 per year or \$18,000 for 50 locations.

[2] **Q.** And so, what happens to the per location rate in that

[3] circumstance?

[4] **A.** In that situation it goes up, it doubled in that situation.

[5] **Q.** Okay. So, could you describe what happens under the

[6] license if the number of customer locations goes up during the

[7] course of the agreement?

[8] **A.** Sure. We have an organic growth concept built into this

[9] license that allows the fee to be adjusted upward -- the base

[10] fee to be adjusted upward if growth exceeds 8 percent per year.

[11] So, that \$18,000 I talked about over five years would go higher

[12] if the growth increased over 8 percent per year.

[13] **Q.** What effect does organic growth have on the per location

[14] rate under the license?

[15] **A.** That, it would have the -- it would drop the per location

[16] rate.

[17] **Q.** Could you also take a look at subparagraph K which is on

[18] the next page, page 3 of 9, and explain what the acquired

[19] service fee is?

[20] **A.** The acquired service fee is, there is two different ways to

[21] look at it. If the acquiring -- if the person acquiring a

[22] service, and that service had a license already with BMI, you

[23] would just basically take that service's effective rate on top

[24] of your base fee. If the service didn't have a license with

[25] BMI, you would take the lowest effective rate that the contract

[1] allowed and add that to your base fee. You would consider,

[2] basically, organic growth.

[3] **Q.** So, how does the growth by an acquisition compare to --

[4] well, first, why don't we define, what is organic growth under

[5] the agreement? What kind of growth is that?

[6] **A.** Organic growth is standard growth, normal business growth.

[7] They go out seeking to increase their customer base or their

[8] licensing of the industries. Drives customers numbers up.

[9] **Q.** And what is acquired growth?

[10] **A.** Buying somebody that's already in the marketplace.

[11] **Q.** How does the way that organic growth is treated compare to

[12] the way that acquired growth is treated under the license?

[13] **A.** Organic growth you are allowed an 8 percent -- basically an

[14] 8 percent cushion, if you will, before you start adding to your

[15] base fee. So, if you are at \$18,000, you are allowed a little

[16] bit of growth and then you pay BMI a little bit more money.

[17] Effectively, your effective rate drops.

[18] Acquired growth, again if they had a license, you

[19] would take that company's existing effective rate and add it to

[20] your base fee. If they didn't have a license, it would be

[21] treated as basically as if you had gone out and increased your

[22] business by that amount of subscribers.

[23] **Q.** If you could turn to the next tab in the binder which is

[24] joint exhibit 0132 -- and we are at tab 4, just to be clear --

[25] could you identify this document, please?

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[1] A. This is the agreement which was reached between BMI and
 [2] Muzak.
 [3] Q. And were they the first commercial music service to enter
 [4] into the agreement that we've just been looking at?
 [5] A. Yes, they were.
 [6] Q. Were there negotiations between BMI and Muzak prior to
 [7] entering into this agreement?
 [8] A. Yes, there were.
 [9] Q. Were you involved in those occasions?
 [10] A. No, I was not.
 [11] Q. And who was?
 [12] A. My predecessor who is the senior vice president of
 [13] licensing at the time John Shaker, Marvin Berenson our general
 [14] counsel, Tom Annastas who is our vice president of general
 [15] licensing, and I believe Joseph DiMona, who is a vice president
 [16] of legal.
 [17] Q. And, do you know who is involved on the Muzak side?
 [18] A. I know of Mike Zendan who is their general counsel but I
 [19] don't know of anybody else.
 [20] Q. Are you familiar with the agreement that is joint exhibit
 [21] 0132?
 [22] A. Yes, I am.
 [23] Q. Could you turn to paragraph 4A of the agreement which
 [24] starts on page 4 and describe how the base fee works under this
 [25] agreement?

[1] of the top left-hand corner it tells you the year, 2005, and it
 [2] will give you the span of the contract term for that particular
 [3] service. The next column is current affiliation, independent
 [4] or Muzak affiliate or Music Choice affiliate or so on. The
 [5] account number, the contract I.D. number which is the actual
 [6] contract they signed, the base license fees which were
 [7] calculated using a \$36.36 rate times the number of locations
 [8] which is the next column. Then the organic surplus fee, that
 [9] would be the fee in addition to the base fee that if they grew
 [10] over the 8 percent they would owe to BMI. The acquired
 [11] locations, the acquired locations fees. Force majeure
 [12] locations, that is if something happened, God forbid, like
 [13] Katrina that forced a lot of businesses off the air, we would
 [14] give them relief under the contract for that. Total license
 [15] fees. And then the very last column is the effective rate of
 [16] those license fees.
 [17] Q. And so, what years are covered on Joint Exhibit 1293?
 [18] A. They would be all years through all five years of the term
 [19] of the agreement.
 [20] Q. And which licensees are actually included?
 [21] A. Every licensee but DMX, their eight affiliates and the one
 [22] Music Choice affiliate.
 [23] Q. And if a licensee had the agreement over the five years,
 [24] would it appear once for each year on this chart?
 [25] A. Yes, it would. So you can track -- you can actually track

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[1] A. Yes. Muzak agreed to pay BMI \$30 million from July of 2004
 [2] through June 30th of 2009.
 [3] Q. And if you could turn to paragraph 4B, what representation
 [4] does Muzak make with respect to its number of customer
 [5] locations?
 [6] A. That they had 165,000 locations licensed.
 [7] Q. As of what date?
 [8] A. As of December 31st of 2003.
 [9] Q. And so, what does this work out to as a starting point at a
 [10] per location rate under this agreement?
 [11] A. If you took the \$30 million, divided it by the five years,
 [12] you get \$6 million a year divided by 165,000 locations comes
 [13] out to \$36.36.
 [14] Q. And, how does this Muzak agreement compare to the agreement
 [15] that we were just looking at at tab 3?
 [16] A. It was the basis for that agreement.
 [17] Q. Now, if you can take a look at tab 5, which is also a joint
 [18] exhibit, Joint Exhibit 1293, and could you identify this
 [19] document, please?
 [20] A. Sure. This is entitled the Commercial Music Services
 [21] Annual Fee and it is a lot of columns. It lays out for each
 [22] year of the contract -- well, I can take you through the
 [23] columns.
 [24] Q. Sure. Why don't you go through the columns.
 [25] A. For each year of the contract, if we look at the first page

[1] the effective rates of customers over the period of five years.
 [2] Q. Now, I think that we have highlighted just a couple
 [3] examples to take you through and we will start with Muzak. Is
 [4] Muzak actually highlighted on your copy?
 [5] A. Yes, it is, on page 2.
 [6] Q. And so, could you take us through using the columns as you
 [7] just described, take us through how this chart actually works
 [8] for Muzak?
 [9] A. Okay.
 [10] If you look, again the contract year is '05, the span
 [11] is from June 30th of '05 through -- I'm sorry, July 1st of '04
 [12] through the end date of June 30th of '05. Muzak had base
 [13] locations at the very beginning of the contract as we just saw,
 [14] the 165,000 locations. The annual license fee or base fee is
 [15] \$6 million per year. The actual locations reported to us at
 [16] the end of the first contract was 165,136 locations so they
 [17] actually grew by 136 locations, but there was no change in that
 [18] because it was below the 8 percent so they didn't owe us any
 [19] more money, they were allowed that growth.
 [20] Q. Is that why there is a zero in the organic surplus fee
 [21] column?
 [22] A. Yes, it is. They didn't acquire anybody, that's why there
 [23] are zeros there.
 [24] And if you come up to the very end, the total fees due
 [25] were \$6 million but we divide it now by the \$165,136 locations

[1] to get an effective rate of \$36.33 which was different from the
[2] starting \$36.36.

[3] **Q.** Now, could you go to the next year, 2006, and just take us
[4] through the same exercise for Muzak?

[5] **A.** That is found on page 6 of 15, and just if you look at the
[6] base locations, again, that hasn't changed, it was 165.

[7] **Q.** We are in the third row down on page 6 of 15?

[8] **A.** Yes, third row down. The year is 2006, the contract year
[9] again goes from July of '05 through June of '06. Muzak LLC is
[10] the name. And if you scroll over to the column I which is the
[11] base locations, it is still listed as the original base
[12] locations. That hasn't changed. The base license fees haven't
[13] changed, that's \$6 million per year. The actual location has
[14] dropped. I believe at the end of 2005 they had 165,136, now
[15] they're recording 165,039 locations so they lost some
[16] locations. So, their effective rate went back up, effectively,
[17] to \$36.36.

[18] **Q.** And then we can skip the exercise for 2007 and 2008?

[19] **THE COURT:** Mr. O'Neill, I'm simply not following.

[20] The base locations were 165 and the actual is 39 more,
[21] isn't it?

[22] **THE WITNESS:** Yes. I was talking --

[23] **THE COURT:** So you say it went down. It seems to me
[24] it went up.

[25] **THE WITNESS:** It did go up, your Honor, but from the

[1] the same explanation?

[2] **A.** Okay.

[3] If we jump backward to page 3 of 15, Play Network is
[4] listed right at the bottom in yellow for 2005. They started
[5] the year with 11,017 locations, were paying fees of \$400,578.
[6] That was the base license fees. At the end of the year they
[7] actually reported 13,190 locations so they actually increased
[8] over 8 percent. And if you look at the organic growth surplus
[9] fee under column L, they paid BMI an additional \$43,000 --
[10] \$43,500 for that year. For a total fee you would add the
[11] \$43,498 to the original base fee of \$400,578 and you would come
[12] up with a new total fees of \$444,076 and their effective rate
[13] dropped to \$33.67 per location.

[14] **Q.** And then if we could, we can cut out the middle years but
[15] if you could go to 2009 and just explain, do the same
[16] explanation but for Play Network at the end of the contract?

[17] **A.** Sure.

[18] Again, they started the original contract -- that's on
[19] page 15 of 15 at the very bottom in yellow. They started the
[20] original contract year in '05 with 11,017 locations. At the
[21] end of this contract they actually had 32,595 locations, almost
[22] triple their number of establishments, so their effective rate
[23] has dropped to \$24.75 per location.

[24] **Q.** And what is the column L, the organic surplus fee for 2009?

[25] **A.** It has actually grown to almost -- actually has grown

[1] prior year they had 165,136 locations so I'm saying they lost
[2] about a hundred locations year to year.

[3] **THE COURT:** Between those two years?

[4] **THE WITNESS:** Yes, sir.

[5] **THE COURT:** I see.

[6] **BY MR. FITZPATRICK:**

[7] **Q.** And if you could go to the, Mr. O'Neill, the final year
[8] represented on this exhibit which is 2009 and again take us
[9] through that exercise for Muzak, please?

[10] **A.** Sure. That's the very last page of the document, page 15
[11] of 15, and it is highlighted about a quarter of the way down
[12] the page. Muzak, again the base license fees were \$6 million.
[13] There are actual locations at the end of the term dropped to
[14] 156,733 so they've lost almost 10,000 locations. And if you go
[15] all the way to the right which is the effective rate of their
[16] license now, they're paying us respectively \$38.28 per
[17] location.

[18] **Q.** Now, are there also examples of music services whose per
[19] location rate, effective rate, declined over the course of the
[20] agreement?

[21] **A.** Yes, there are.

[22] **Q.** And I think we have highlighted an example of that on the
[23] chart which is Play Network. So, if you could just do the same
[24] thing to show how it works for a service that is gaining
[25] locations and start with Play Network in the year 2005 and do

[1] larger than their base fee originally. Their base fee was
[2] \$400,000 which is column J at the very beginning of the
[3] contract, never changed per year, but now they're paying in
[4] addition to that \$400,000 an additional \$406,000 on top of
[5] that.

[6] **Q.** Now, using again using this document, could you give the
[7] yearly -- the yearly averages and the overall average rates
[8] that the industry has been paying using this document?

[9] **A.** Sure. If you look on page 3 of 15, the end of the first
[10] year, the average rate per location came up to \$35.59.

[11] **Q.** And is that for the entire industry?

[12] **A.** That's for the entire industry.

[13] **Q.** And if you could go to 2006?

[14] **A.** That's on page 6 of 15. The total effective rate for the
[15] entire industry was \$34.77.

[16] **Q.** Is that highlighted on your copy?

[17] **A.** It is highlighted in green on our copy so it dropped --
[18] again, it dropped from the first year it was \$35.59, it went
[19] down to \$34.77 in the second year.

[20] **Q.** And if you could do the same for 2007, please?

[21] **A.** On page 9 the average was \$33.87 for the entire industry.

[22] **Q.** And the same for 2008?

[23] **A.** 2008 is page 12 of 15 and the average fee is \$34.06, per
[24] location, per year.

[25] **Q.** And then, finally, if you could give the numbers for the

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[1] 2009 year as well as the overall average for the five?

[2] **A.** That's on page 15, the last page. The 2009 average was

[3] \$34.43 and the overall average for the full five-year term for

[4] everybody in the, operating under this license, I guess it was

[5] the 164 businesses, came to \$34.52.

[6] **Q.** Did these data factor into your evaluation of your proposal

[7] to DMX?

[8] **A.** Yes, it did.

[9] **Q.** Could you explain that?

[10] **A.** Well, we wanted to offer DMX the same exact license that

[11] everybody here signed. Unfortunately DMX had lost locations

[12] from 2005 to 2009 so their effective rate would have been north

[13] of the \$36.36. They probably would have been higher, around

[14] where Muzak was, you know, \$38, \$39 per location. We didn't

[15] offer that to them, we offered them the straight \$36.36 rate as

[16] a starting point. We didn't look back and say this could have

[17] happened or that could have happened. We knew what happened

[18] and we didn't want to basically hamstring them with the higher

[19] rate.

[20] **Q.** Did you consider the 8 percent organic growth provision of

[21] the contract that we've been talking about in evaluating your

[22] proposal to DMX?

[23] **A.** Yes.

[24] **Q.** And what effect did that have on your thinking?

[25] **A.** Again, we -- I would offer it to DMX. I don't think

[1] charged them the \$36.36 rate and they paid that. And then, on

[2] a going forward basis or actually from 2004 to 2009, they paid

[3] us based on their number of locations excluding Direct TV.

[4] **Q.** Mr. O'Neill, what is ASCAP?

[5] **A.** I ask myself that a lot.

[6] ASCAP is a performing rights organization, they're a

[7] competitor, our main competitor for writers and publishers.

[8] **Q.** And do you know what ASCAP was getting from Muzak during

[9] the license term 2005 to 2009?

[10] **A.** I believe it was \$41.50 or thereabouts.

[11] **Q.** If you could turn to the next tab in your binder, could you

[12] identify this document?

[13] **A.** Tab 6?

[14] **Q.** Tab 6, yes.

[15] **A.** This is the 2007 annual report for Muzak.

[16] **Q.** Did you consider this document in evaluating your proposal

[17] to DMX?

[18] **A.** Yes, we did.

[19] **MR. FITZPATRICK:** And, your Honor, this is

[20] Petitioner's Exhibit 0112 and I would move its admission.

[21] **MR. RICH:** We would object, your Honor, to the extent

[22] that the purpose of its offer is to validate whatever fees that

[23] Muzak may or may not have paid ASCAP. And, from the witness'

[24] testimony, it sounds as if he relied on this document in

[25] forming his knowledge. This is rank hearsay. This is a

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[1] they'll take it. I don't think they -- it's only going to hurt

[2] them versus the \$36.36 straight rate because they lost

[3] locations. They would have effectively paid us higher than

[4] that. They didn't have the 8 percent growth that some of these

[5] others had.

[6] **Q.** Are you familiar with an issue that arose with respect to

[7] Music Choice and Direct TV during the term of Music Choice's

[8] contract?

[9] **A.** Yes. Yes, I am.

[10] **Q.** Could you explain what occurred there?

[11] **A.** Sure.

[12] Music Choice was negotiating the execution of the

[13] commercial music agreement with BMI. At the time of the

[14] negotiation they were losing about 25,000 locations that they

[15] had licensed via Direct TV and they felt that they didn't want

[16] to be hampered by that going forward because their effective

[17] rate would have been so much higher for the locations they had

[18] left. They knew they were losing them, they knew going into

[19] this license they were losing them so they wanted to treat them

[20] separately from their core business.

[21] **Q.** And did BMI accommodate that request?

[22] **A.** Yes, we did.

[23] **Q.** How did that work?

[24] **A.** We actually did two license agreements with them. For the

[25] period of time that they actually had the Direct TV licenses we

[1] statement of fact by a third-party not sitting in the witness

[2] chair.

[3] **MR. FITZPATRICK:** Your Honor, it is true that this

[4] doesn't come in for truth of it but it does go into how

[5] Mr. O'Neill evaluated his, the proposal that he was making to

[6] DMX.

[7] **THE COURT:** Well, Mr. Rich, if a witness is testifying

[8] to his understanding during a negotiation and some of his

[9] understanding consists of false information, I don't think that

[10] disqualifies it as still having been an ingredient in his

[11] acting the way he did during the negotiations.

[12] **MR. RICH:** I understand that.

[13] Your Honor, I wouldn't quarrel with that. Two

[14] questions ago, though, the foundational question was do you --

[15] to the effect do you have an understanding of what ASCAP

[16] received from Muzak. And the witness said words to the effect:

[17] Yes, I do; then he testified to a number. It turns out now the

[18] only connection and foundation for that is a document which is

[19] clearly hearsay.

[20] **THE COURT:** You think the question should have been do

[21] you have either a misunderstanding or an understanding,

[22] gentleman, and what is that based on? And it is based on a

[23] document we know is not reliable.

[24] **MR. RICH:** Within that context I accept your Honor's

[25] characterization.

[1] **THE COURT:** I will accept it with that caution to
 [2] myself and counsel, that it is not for the truth. It is not
 [3] independent, valid evidence of the Muzak figures.
 [4] **MR. RICH:** Thank you.
 [5] **BY MR. FITZPATRICK:**
 [6] **Q.** Mr. O'Neill, could you turn to page 6 of the document?
 [7] **A.** Okay.
 [8] **Q.** And at the bottom of the page there does it list a license
 [9] fee that ASCAP is reported to be paying to Muzak?
 [10] **A.** The last paragraph of that page about midway through the
 [11] fixed license fee of \$6.8 million per annum. That's what it
 [12] listed for the ASCAP license.
 [13] **Q.** Did you consider that number in evaluating BMI's proposal
 [14] to DMX?
 [15] **A.** Yes, we did.
 [16] **Q.** What would the \$6.8 million number work out to as a per
 [17] location rate?
 [18] **A.** I think it comes out to \$41.20 but for some reason I had
 [19] \$41.50 sitting on my brain.
 [20] **Q.** How did that number factor into your thinking when you
 [21] evaluated BMI's proposal to DMX?
 [22] **A.** When we looked at the starting blanket rate of \$36.36 it
 [23] was well below the \$41.20 that ASCAP was asking from Muzak.
 [24] **MR. RICH:** Objection.
 [25] **THE COURT:** What is the objection?

[1] we felt it was reasonable.
 [2] **MR. FITZPATRICK:** Your Honor, the next document is not
 [3] in Mr. O'Neill's binder, it is a document that's been produced
 [4] by ASCAP.
 [5] **THE COURT:** Mr. Fitzpatrick, would it be a fair
 [6] paraphrase and sufficient for my notes and reliance on this
 [7] little piece of testimony about ASCAP to take it as amounting
 [8] to that he thought the \$36.36 was a little under what he
 [9] thought ASCAP was getting?
 [10] **MR. FITZPATRICK:** It would be a fair summary of where
 [11] we are right now, your Honor.
 [12] **THE COURT:** Maybe we are going somewhere else later?
 [13] **MR. FITZPATRICK:** We are going somewhere else right
 [14] now which is that the next tab in your Honor's binder is not in
 [15] Mr. O'Neill's binder because it is the actual ASCAP agreement,
 [16] it is a document that was produced by ASCAP and marked
 [17] restricted and so it is not something Mr. O'Neill saw then and
 [18] it is not something Mr. O'Neill can see now. It is, however, a
 [19] joint exhibit so I would refer the Court to it. And I won't go
 [20] through the numbers in open Court, but the numbers are on the
 [21] face of the document and it is a joint exhibit and I think that
 [22] would impact --
 [23] **THE COURT:** What are you going to do with that,
 [24] Mr. Rich?
 [25] **MR. RICH:** Your Honor, I have don't have a problem and

[1] **MR. RICH:** Well below the amount that ASCAP was
 [2] asking.
 [3] **THE COURT:** Excuse me?
 [4] **MR. RICH:** He doesn't know what ASCAP was asking, your
 [5] Honor.
 [6] **THE COURT:** What was ASCAP asking?
 [7] **THE WITNESS:** I don't know what they were asking. I
 [8] know what this document says they were getting. They were
 [9] getting \$6.8 million a year or \$41.20 per location from Muzak.
 [10] **BY MR. LARSON:**
 [11] **Q.** And so, how did the report in this -- how did the reported
 [12] number in this document factor into your thinking?
 [13] **A.** Our blanket fee, starting point, was below that number.
 [14] Our adjustable fee blanket quote, the full fee quote, the
 [15] \$41.81 was just a hair above that number and I felt that was
 [16] reasonable.
 [17] **Q.** Why is that?
 [18] **A.** I believe the industry uses a little bit more ASCAP music
 [19] than BMI music in general, it is just some of the historical
 [20] catalog that ASCAP has versus BMI has used more in the
 [21] background music business.
 [22] So, while BMI was describing to get a higher blanket
 [23] rate from the background music, we felt we were comfortable for
 [24] our affiliates to go with the \$36.36 rate versus where our
 [25] competitor was feeing these same establishments. That's where

[1] there is no inconsistency. We don't object to this. I was
 [2] simply talking about the witness' state of mind and his
 [3] knowledge.
 [4] **THE COURT:** But now that we know from a joint exhibit
 [5] it becomes academic --
 [6] **MR. RICH:** No objection. Here, again, he was
 [7] testifying as to how he formulated a view based on data.
 [8] **THE COURT:** Yes.
 [9] **BY MR. FITZPATRICK:**
 [10] **Q.** Mr. O'Neill, are you familiar with the term "through the
 [11] listener" or "through the customer" license?
 [12] **A.** Yes, I am.
 [13] **Q.** Could you explain what that term means?
 [14] **A.** Yes.
 [15] What it means to me is it is a downstream looking
 [16] license where one party will request a license to cover all
 [17] performances along a stream, if you will, ultimately to the end
 [18] user. In this case DMX is requesting a license that covers not
 [19] only the performances of music by DMX but also performances of
 [20] the music which is performed by DMX' customers, the stores or
 [21] bars or establishments, if you will.
 [22] **Q.** And did you consider that fact in evaluating BMI's proposal
 [23] to DMX?
 [24] **A.** Yes.
 [25] Again, I came into this with some fresh eyes that I

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[1] thought when you look at a \$36.36 per location rate that's
 [2] about 10 cents a day for a very large music user, if you will,
 [3] of a background music provider, and then you look at the
 [4] revenues of not only what DMX is making but what are the end
 [5] users making. I think the effective rates of that are
 [6] extremely low vis-a-vis the full stream of through to the
 [7] listener or through to the viewer. And, again, I came back to
 [8] the fact that the \$36.36 was established and I felt it was
 [9] reasonable.

[10] **Q.** Does BMI license directly restaurants, hotels, bar, stores,
 [11] etc.?

[12] **A.** Yes, we do. I think we have, last look, about 45,000
 [13] eating and drinking establishments licensed directly.

[14] **Q.** And, how did the rates of those licenses compare to the
 [15] rates paid by commercial music services per location?

[16] **A.** On an eating and drinking establishment license I think the
 [17] minimum fee is \$300 a year, roughly. And we have them up to
 [18] \$9,000 a year paying us and that is compared to \$36.36 per year
 [19] from a commercial music service.

[20] **Q.** And, did that factor into your thinking in evaluating your
 [21] proposal to DMX?

[22] **A.** Yes, it did. But, again, we had historical licenses where
 [23] the commercial music services industry at rates actually lower
 [24] than this that had been built up to the 2004 license. And it
 [25] has always been brought to my attention that the background

[1] percent, the reason it is 17 percent is we have some licenses
 [2] that carry a very low overhead rate and some licenses that
 [3] carry a high overhead rate. For instance, the ones with the
 [4] low overhead rate we have reciprocal agreements with 70 foreign
 [5] societies, sister societies across the world. These societies
 [6] basically go out, find establishments that are using music,
 [7] negotiate license fees with these establishments, figure out
 [8] what music is being played in these establishments, distribute
 [9] those funds back to BMI, and they take out administrative fees
 [10] from that. But, the information coming to us is already
 [11] pre-identified. So we take out only 3.6 overhead rate on our
 [12] foreign incoming.

[13] **Q.** And let me just slow you down a little bit. Why don't you
 [14] take us through a hypothetical of what would happen if a BMI
 [15] affiliate's work was performed at a concert or on the radio in
 [16] a foreign country, say in Japan, for example. Track how that
 [17] revenue would get to the BMI affiliate for me.

[18] **A.** The Japanese society, Jazz Rack I believe the name is,
 [19] would actually license the venue where the concert took place.
 [20] They would go in and fee the promoter of the concert. The
 [21] entertainers would provide Jazz Rack with a setlist of actually
 [22] what was played during that concert. Jazz Rack would take the
 [23] money in-house, take off their administration, pay what was
 [24] left over back to those performances and ship that money back
 [25] to the states to BMI.

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[1] music said they were able to bring us massive customers,
 [2] 400,000 customers, and that that's what the discount was for.

[3] **Q.** Okay, so let's move on to the second part of BMI's
 [4] proposal, the base fee. Can you describe how BMI arrived at
 [5] its proposed number which, if we go back to -- when we go back
 [6] to tab 1 in the binder, is \$712,218.95?

[7] **A.** The 95 cents was important.

[8] The \$712,000, the way we came to that number was we
 [9] basically wanted to cover our expenses in this license. We
 [10] felt that if a writer should not be disadvantaged if they were
 [11] performed on DMX versus another background music service and if
 [12] we didn't cover our expenses in the license, then it wasn't
 [13] economical to us. I mean, in theory, if we didn't cover any
 [14] expenses and DMX was able to direct license everything from BMI
 [15] they would pay zero and it would still cost us \$700,000 to do
 [16] this license and they would still get the indemnity and full
 [17] access to it. So, we felt when we came up to the 712 we looked
 [18] at what is our standard domestic overhead rate and that rate
 [19] was 17 percent. And then we added to that the incremental cost
 [20] that we believed we would incur administering this license.

[21] **Q.** Okay, so let's start with the 17 percent domestic rate.
 [22] Can you explain how that rate is arrived at?

[23] **A.** Yeah. It's -- we've had published documents that say BMI's
 [24] overhead rate is anywhere from 11.8 to 12 percent but that's
 [25] overall revenues. And when I look at domestic revenues, the 17

[1] **Q.** And then what is left for BMI to do at that point?

[2] **A.** Well, BMI has some administration on that. I mean, it is
 [3] not just a rubber stamp, if you will, we still have to match it
 [4] up to our database. We have to mail the checks out to our
 [5] affiliates. We still have to have systems in place with Jazz
 [6] Rack to talk back and forth.

[7] **Q.** And what overhead rate does BMI apply to that tape of
 [8] revenue?

[9] **A.** We take out a minimum of -- I mean a very minimal overhead
 [10] rate of 3.6 percent on any foreign revenues coming into this
 [11] country.

[12] **Q.** And then if you could, compare that to what would track the
 [13] revenue for me on a U.S. performance? How would BMI distribute
 [14] that? What steps does BMI have to go through to get that to
 [15] its affiliate?

[16] **A.** First, if you want to take an easy case or a hard case, we
 [17] would have to find the establishment using the music, we would
 [18] have to license that establishment, we would have to collect
 [19] the license fees, collect the music use information, run it
 [20] through our database to see who is payable, who is not payable,
 [21] and then make those distributions.

[22] **Q.** And what overhead rate does BMI apply to that tape of
 [23] revenue?

[24] **A.** Well, there is two overheads that we apply to that type of
 [25] revenue. For a little bit more intensive distribution like a

[1] follow-the-dollar distribution we would take off 20 percent
[2] overhead rate and then what is left over, basically, is the
[3] available expenses that haven't been accounted for divided by
[4] total remaining revenue and that comes up to 17 percent.
[5] Q. And why did BMI use the 17 percent number as the starting
[6] point for its cost for the DMX license that it is proposing
[7] here?
[8] A. Again, we thought it was reasonable to use the standard
[9] overhead. That's right, currently what we are taking out from
[10] Music Choice, from Muzak, from Play Networks or TrueSonic,
[11] that's the rate we apply against those services. So, we wanted
[12] to treat again, similarly, DMX. We didn't want to treat them
[13] any differently.
[14] Q. And, conversely, why didn't you use the published rates
[15] that you mentioned before, the 11 to 12 percent overhead rates?
[16] A. Because, again, that would entail us counting the foreign
[17] and having a much lower overhead rate for DMX than we would for
[18] Music Choice or Muzak or any of the others.
[19] Q. You also mentioned that you added the incremental costs on
[20] top of the 17 percent, correct?
[21] A. Yes, we can.
[22] Q. Can you explain what that means?
[23] A. Sure.
[24] We anticipate that the 17 percent covers our basic
[25] operations but this is going to be a little bit more intensive

[1] than our basic operations. So, we tried to determine at this
[2] point in time what an incremental fees we were going to incur
[3] and I had some experience with the television for program
[4] license when that first started for BMI back in '94 trying to
[5] estimate what those fees would be.
[6] Q. If you could turn to tab 8? If you could take a look at
[7] that document and identify it, please?
[8] A. Sure. This is a document entitled Additional Cost of the
[9] AFBL Licensing and Performing Rights Departments.
[10] Q. Why are the licensing and performing rights groups together
[11] on this document?
[12] A. Because I think they're going to have an impact on each
[13] other, unlike many of the other licenses we are going to have
[14] to work in concert with performing rights to make sure that
[15] we're, one, not charging DMX for music that they may have
[16] directly licensed; and two, not paying affiliates that may have
[17] directly licensed via BMI's distribution system.
[18] Q. Will departments other than licensing and performing rights
[19] at BMI have additional incremental expenses under the AFBL?
[20] A. Yes. I believe probably the biggest focal point will be IT
[21] and operations.
[22] Q. And are those expenses included on this chart?
[23] A. No. This is just licensing and performing rights.
[24] Q. If you could take us through the chart and explain what the
[25] various tasks are in the left-hand column and why you believe

[1] they would be necessary to administer the AFBL?
[2] A. Sure.
[3] The first is review and input renew and direct
[4] licenses. And we have had some experience with that under the
[5] interim license. I believe we had over 300 direct licenses
[6] come in and that is simply going through the direct licenses,
[7] making sure, one, they're signed because we realize there were
[8] a lot that were unsigned, what are the date stands, what are
[9] the terms, did the person executing the direct lines actually
[10] have the authority to do so.
[11] It will be those types of review and analysis.
[12] Q. And what is the contemplated personnel for that task?
[13] A. We assumed hiring a new person, a sort of paralegal-type
[14] person to be able to review those and to communicate internally
[15] with us on that. We assumed about 250 hours over a full year
[16] at a rate of \$40 an hour for a total of \$10,000.
[17] Q. And where does the hourly rate come from?
[18] A. That's an internal rate we use. We have a subsidiary
[19] company at BMI and this is the rate we use internally to charge
[20] various levels time across interdepartmental work.
[21] Q. If you could go down to the second task and, again, please
[22] explain the task and the personnel and the estimates?
[23] A. The task is resolve direct license issues with affiliates
[24] and with DMX. The people we have doing it, there is a business
[25] affairs attorney, Fiona Kwasnik. F-I-O-N-A, K-W-A-S-N-I-K.

[1] Do you need me to name the people?
[2] Q. Sure.
[3] A. Okay. Michael Tortora. T-O-R-T-O-R-A. Misha Hunke.
[4] M-I-S-H-A, H-U-N-K-E. Michael Steinberg. And Alison Smith.
[5] They're a mixture of performing rights group and licensing
[6] group, and what this would be is to actually do exactly what
[7] the task says, resolve issues on direct licenses with either
[8] publishers, with songwriters, with writers feeling that they
[9] didn't get paid from their publishers via direct license,
[10] answering questions what would you have paid if we didn't
[11] directly license.
[12] Those are the types of resolutions.
[13] Q. Now, the task says resolve direct license issues with
[14] affiliates and DMX. What type of resolutions with DMX do you
[15] contemplate?
[16] A. Again, I think it would be once -- I think it would be term
[17] dates, I think it would be did we receive the direct license in
[18] time for it to apply against the report in question, did it
[19] convey the full rights that would be needed, what was the
[20] catalog of works that it represented, do we have the full
[21] catalog or not, was BMI missing a piece, was DMX missing a
[22] piece?
[23] It was kind of a two-way communication going back and
[24] forth.
[25] Q. And, how many hours do you have listed for that test?

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[1] A. For the lower level people, 125 hours; and for Michael
[2] Steinberg and Alison Smith about 50 hours a year.

[3] Q. Are all of the rates in the hourly rate column as you
[4] described earlier the internal rates used for the subsidiary?

[5] A. Yes, they are.

[6] Q. If you could go down to the third task and explain what's
[7] involved with that?

[8] A. Yes, it is resolving disputes regarding credits with DMX
[9] and MRI and, again, part of this comes from my experience with
[10] television for program working with MRI. There are --

[11] Q. How did that experience play into coming up with these
[12] estimates?

[13] A. I think it allowed me to sit back and say in per-program we
[14] have five people internally dealing with television per-program
[15] with MRI for the most part. Here we are asking for one new
[16] hire and we are absorbing the work amongst our colleagues at
[17] BMI. It is not -- in practice, it is not easy to initially
[18] work these licenses. I think with time you become some of
[19] these things become repetitive, like direct licensing, we may
[20] do a direct license and that may save some time, but with MRI
[21] that is constant back and forth data transfers that need to go
[22] on, there is constant explanations of why you were taking a
[23] credit versus not giving a credit or why they were taking a
[24] credit on something that may not -- maybe they shouldn't have
[25] taken a credit on. And that could be as simple as we believed

[1] chart?

[2] A. Yes, it is. I think it is a large learning curve which we
[3] didn't build in here and it evens out to standard operating
[4] procedure after a while.

[5] Q. Does it become less expensive over time?

[6] A. I think it becomes less expensive. I think -- I think
[7] there is operational efficiencies that get built into the
[8] license.

[9] Again, we will take a license that might be mandated
[10] by the Court or negotiated between the parties but then we
[11] actually have to implement that license and there is a lot of
[12] gray when you are doing something like that operationally.

[13] Q. Could you explain what the next task you have listed there
[14] is and what it involves?

[15] A. These are, it would be the adjustable fee blanket license
[16] project meeting team and this is just an update on the progress
[17] of the development of the system, the specs of the license, are
[18] we receiving reports on time, are we crediting correctly, what
[19] are the results of that crediting, are there major disputes
[20] that need to be resolved, did a report come in on time but BMI
[21] for some reason didn't process it and we had to give on issues;
[22] are there disputes over direct licenses which will have an
[23] impact on not only this report or subsequent reports or past
[24] reports.

[25] All of these things, again, based on experience of

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[1] it was a BMI work but it is actually an ASCAP work.

[2] Those are the types of issues that would need to be
[3] resolved.

[4] Q. How many hours do you have listed for this particular test?

[5] A. For program supervisor we assumed 375. That person deals
[6] now directly with DMX -- I'm sorry, deals directly with MRI on
[7] a daily basis. The new hire would also be involved in this for
[8] 750 hours a year. And we assumed Mike Steinberg, who is our
[9] vice president of business affairs, would be called on to
[10] interpret contract language as has happened many, many times on
[11] the per-program side.

[12] Q. And I'm not sure if we've covered this, but you said deals
[13] with MRI. Could you explain who MRI is and where they fit into
[14] this process?

[15] A. Yes.

[16] MRI prepares the reports for DMX and they send those
[17] reports to BMI. They tell us, you know, basically what music
[18] was used on DMX, of that music how much have they directly
[19] licensed and how much they haven't.

[20] Q. And, have you dealt with MRI in connection with other
[21] licenses as well?

[22] A. Yes, I have.

[23] Q. And, which licenses have you dealt with MRI on for BMI?

[24] A. From an administration standpoint, the per-program license.

[25] Q. And is that experience reflected in your estimates in this

[1] per-program will come into the adjustable fee blanket.

[2] Q. Are any of the hours or costs listed on this chart, are
[3] they costs that BMI already incurs in administering blanket
[4] licenses?

[5] A. No. These are all incremental costs.

[6] Q. Have you given any consideration to whether it could be
[7] possible to save any of these costs in administering the AFBL?

[8] A. Yes. Yes, I have. And I think there are certain ways -- I
[9] mean if DMX provided BMI the direct licenses and if we had a
[10] template built and BMI put those against our database and
[11] processed it, it would be much more efficient versus having to
[12] compare a report versus our information, reconcile those two
[13] reports, argue over the reconciliation and get it out. I think
[14] it would save numerous steps but that's not what's been asked.

[15] Q. Now, you said provide BMI with the direct licenses. Do you
[16] mean with the actual credit report or do you mean the actual
[17] direct licenses themselves?

[18] A. The actual document from the publisher or the songwriter or
[19] composer that they've dealt with. If they provided BMI with
[20] the term sheets or the deals themselves it would allow us to
[21] put them against our affiliate database to know if we were
[22] going to pay Mike O'Neill for a song, now we don't have to pay
[23] him.

[24] Q. But DMX has provided BMI with copies of the direct
[25] licenses, correct?

[1] **A.** Yes, but they're also doing their own reports internally
[2] which will tell us what they believe is in the BMI repertoire
[3] and what they believe isn't. And that's how there is going to
[4] be a lot of reconciliation in that.
[5] **Q.** So, if you could explain again what would have to happen in
[6] order to save some of the money under here? What is it that
[7] DMX would have to give you and do to save some of the money
[8] that you have listed on this chart?
[9] **A.** I believe it would simply be a matter of DMX providing BMI
[10] with the direct licenses they have with publishers, BMI taking
[11] that information, running it against our distribution and
[12] providing back to DMX a credit report to say these direct
[13] licenses relate to these affiliates, here is your credit, here
[14] is ones that we didn't have, here is ones that you didn't have
[15] and we would have to resolve it. It would save, probably, two
[16] steps along the way.
[17] **Q.** Have you done any estimates as to hours or dollar amounts
[18] that could be saved using that approach?
[19] **A.** We can probably save the new hire. Besides that, I think
[20] it would maybe be -- I haven't done an in-depth analysis on
[21] that yet.

[22] (Continued on next page)

[1] **BY MR. FITZPATRICK:**
[2] **Q.** Good okay, going to the next step under the BMI proposal,
[3] let's talk about the crediting mechanism. We talked about this
[4] briefly before, but could you explain again how that works
[5] under BMI's proposal?
[6] **A.** Yes. We would take the, it's basically a fraction, the
[7] numerator works, BMI works which DMX has directly licensed.
[8] The denominator is total BMI works, and, again, it's what DMX
[9] makes available for broadcast. They cannot tell us from what
[10] we understand, actually who listens to each channel, but they
[11] tell us what they make available for people to listen.
[12] **Q.** I think you mentioned this before, but how does DMX
[13] distribute music to its customers?
[14] **A.** They do it via satellite, which is off-premise and they do
[15] it via CD or hard drive delivery, which is on-premise.
[16] **Q.** And how are these two businesses handled under BMI's
[17] proposal in terms of the crediting mechanism?
[18] **A.** They're handled the same. We would weight them equally.
[19] **Q.** Do you understand what DMX's proposal is with respect to
[20] the crediting mechanism?
[21] **A.** I believe they only want to use off proxy or the satellite
[22] delivered as -- I'm sorry, off-premise as a proxy for
[23] on-premise delivery.
[24] **Q.** Why does BMI propose using both on and off rather than off
[25] alone?

[1] **A.** We get it now. DMX supplies us with the on-premise data so
[2] we know what music is actually being used there. So I just
[3] don't understand why we couldn't use it in a crediting
[4] mechanism. It's available, it's actually a little bit better,
[5] more detailed information, because we know what locations are
[6] actually using what CD's. From what I understand the
[7] difference by using the off-premise only would save DMX a
[8] substantial amount of money via the crediting mechanism.
[9] **Q.** Could you explain why that is?
[10] **A.** Because when you look at the on-premise performances, they
[11] are not the same music that they make available for the
[12] off-premise performances. It's, from what I understand it's
[13] different, it's not analogous. It's not a good proxy is the
[14] way to say it.
[15] **Q.** And have you looked at what the credit would be using
[16] off-premise alone as compared to looking at on-premise?
[17] **A.** Yes. I believe -- I don't have the exact percentages from
[18] the interim license that was run, but I believe the most recent
[19] report DMX had like a 35 percent credit via their direct
[20] licenses for off-premise only.
[21] **Q.** And what would it have been if they had used on-premise?
[22] **A.** I think it drops to like 21, 22 percent.
[23] **Q.** Does using both on and off-premise add to BMI's incremental
[24] costs as compared to if BMI just used the off-premise proxy?
[25] **A.** No, it doesn't. We use on and off now for distribution to

[1] our affiliates of royalties and we would use that for the
[2] crediting mechanism also.
[3] **Q.** If you could turn to tab 9 in your binder and identify that
[4] document, please? It's Joint Exhibit 0723.
[5] **A.** Yes. This is a letter between, from Marvin Berenson, who
[6] is our general counsel at BMI, to Mike Zendan, vice president
[7] and general counsel of Muzak and John Carroll, who is a lawyer
[8] for Wolfson & Carroll.
[9] **Q.** Do you have an understanding of who Mr. Carroll was
[10] representing in 2004?
[11] **A.** Yes. Mr. Carroll was representing the Muzak affiliates.
[12] While Muzak had about 165,000 locations, the Muzak affiliates
[13] had about 85,000 affiliates that they represented.
[14] **Q.** And what license did the Muzak affiliates take?
[15] **A.** They took the CMS, the standard CMS license or the standard
[16] music license, if you will.
[17] **Q.** At what rate?
[18] **A.** The same rate, \$36.36 with the organic growth and
[19] everything else built in.
[20] **Q.** If you could direct your attention to in the first
[21] paragraph, about five lines up from the bottom, there's a
[22] sentence that starts "in order to resolve." Do you see that?
[23] In order to resolve between them?
[24] **A.** Yes, I do.
[25] **Q.** Could you read that sentence and explain the context of it

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[1] for the Court, please?

[2] **A.** In order to resolve between them the pending rate

[3] proceeding in the BMI rate court known as United States v.

[4] Broadcast Music Inc., in the matter of the application of AEI

[5] Music Network Inc., et al, BMI, Muzak and the Muzak affiliates

[6] also desire to finalize the BMI license fees and terms for each

[7] of these entities for the interim period -- I'm sorry, for the

[8] interim license fee period from January 1, 1994 through

[9] June 30, 2004.

[10] **Q.** Could you explain the context for that sentence? What does

[11] it mean?

[12] **A.** It basically means we finalized the interim period from '94

[13] to 2004 at what was paid.

[14] **Q.** What had Muzak been paying for the '94 to '04 period?

[15] **A.** I believe they were paying between 12 and \$14 per location

[16] on average.

[17] **Q.** Now, after BMI and Muzak reached this agreement, how was

[18] the rest of the commercial music services treated for that '94

[19] to '04 period?

[20] **A.** They were treated similarly. Everybody got the same exact

[21] treatment.

[22] **Q.** Meaning what?

[23] **A.** Meaning we finalized with the entire industry from 1994 to

[24] 2004 at the interim fees that were paid, they became final.

[25] **Q.** Now, the DMX entity that's a part of this proceeding, does

[1] **Q.** If you could take a look at tab -- we can skip tab 10,

[2] actually. If you could go ahead to tab 11. If you could take

[3] a look at that and identify it for me, please.

[4] **A.** This would be an amendment to the commercial music services

[5] agreement for TruSonic, which is a commercial music provider in

[6] the industry.

[7] **Q.** And could you explain the terms of the amendment?

[8] **A.** Basically, it allows TruSonic to exempt locations from

[9] their fee if the location is playing completely directly

[10] licensed music. So they wouldn't have to count that location

[11] in their 36.36 location count to BMI.

[12] **Q.** And what happens if the location plays any non-directly

[13] licensed BMI music?

[14] **A.** It would be basically infringing copyright. They would

[15] have no license for that establishment. It would be a

[16] copyright infringement.

[17] **Q.** Did BMI charge TruSonic any extra for this amendment?

[18] **A.** No, we didn't.

[19] **Q.** Why not?

[20] **A.** What they were saying is here's an establishment that is

[21] playing directly licensed music only, potentially. We don't

[22] need a license for that, we don't want a license for that, so I

[23] wasn't going to try to force them to take a license for those

[24] establishments.

[25] **Q.** Did anyone else in the commercial music services industry

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[1] BMI have any dispute with them about the 1994 to 2004 period?

[2] **A.** No.

[3] **Q.** Why not?

[4] **A.** That was settled with the predecessor. I believe the DMX

[5] that currently exists came through bankruptcy. Their

[6] predecessor, we settled out the period of 1994 through 2004

[7] also at the same rates.

[8] **Q.** And how was that predecessor company treated for the '94 to

[9] '04 period?

[10] **A.** They were treated the exact same way as Muzak or anybody

[11] else in the industry. We finalized the interim fees at what

[12] was paid.

[13] **Q.** Did you consider whether to adjust your proposal to DMX in

[14] this proceeding in light of the finalization of the '94 to '04

[15] period that we've been discussing?

[16] **A.** No, we didn't.

[17] **Q.** Why not?

[18] **A.** I didn't think it was an issue. I thought the \$36.36

[19] contract was the main contract that I was concerned with.

[20] There were a lot of different leverage points that I recall in

[21] the Muzak agreement, and I believe they were asking for a

[22] refund at a certain point in time. They were asking for an

[23] adjustable fee blanket. It was, by settling out that period,

[24] it was no different to me, it had no bearing on what my

[25] going-forward rate was.

[1] ask for an amendment similar to this?

[2] **A.** Not that I recall, no.

[3] **Q.** Would you have made it available if asked?

[4] **A.** Yes. Yes.

[5] **Q.** Has DMX asked you for it?

[6] **A.** No. They've asked for a blanket coverage with a way to

[7] reduce their fees if they directly license certain --

[8] **Q.** And would you make this available to DMX if asked?

[9] **A.** If DMX came to us and said we've directly licensed these

[10] establishments, they're playing all directly licensed music,

[11] yes, I would exempt those establishments from the license.

[12] **Q.** In your view how does this TruSonic amendment compare to

[13] the adjustable fee blanket license that DMX has requested in

[14] this case?

[15] **A.** It's not even -- this is not coverage. This is basically

[16] saying we're not covering that establishment. They can't play

[17] any music that's licensable. If they do, we can sue you for

[18] infringement. There's no indemnity, there's no access, there's

[19] no anything.

[20] **Q.** How does that compare to the AFBL in this case?

[21] **A.** The AFBL is blanket coverage with the option to reduce so

[22] they would be indemnified if they played music. They would get

[23] full access to the catalog and they would have every right to

[24] play whatever they wanted.

[25] **Q.** Has DMX requested license coverage for the provision of its

[1] service to bowling centers?
[2] **A.** Yes, they have.
[3] **Q.** And has BMI made a proposal to cover that?
[4] **A.** Yes, we have.
[5] **Q.** If you could turn to tab 12 in your binder and identify
[6] that document, please?
[7] **A.** This is the BMI adjustable fee blanket license proposal to
[8] DMX for bowling centers. And again, we believe they wanted an
[9] adjustable fee blanket for bowling centers. Again, if they're
[10] providing directly licensed music on some scale to bowling
[11] centers, they would want to be able to reduce their BMI fees,
[12] so we tried to follow the same exact form of our commercial
[13] music adjustable fee blanket.
[14] **Q.** So if you could, just using that demonstrative explain how
[15] BMI's proposal for DMX service being provided to bowling
[16] centers works?
[17] **A.** We currently license bowling centers and the bowling
[18] industry under its own license agreement. There are about
[19] 70,000 lanes licensed currently, and we have two different
[20] rates in the industry. We have the Bowling Proprietors
[21] Association of America rate, which is the majority of lanes
[22] covered under it. I think it's \$14.40 per lane. We have a
[23] higher rate of around \$25, I believe, for the non-affiliated
[24] bowling centers.
[25] **Q.** And which of the rates did you use to set the full fee in

[1] your proposal here?
[2] **A.** We gave DMX the advantage of the lower rate, the \$14.40
[3] rate.
[4] **Q.** And how do you get to the full fee of \$16.60 that's listed
[5] on that document?
[6] **A.** We took the same premium, the 15 percent premium that we
[7] had, which I talked about earlier, and applied it to the 14.40
[8] and that's how we got to the 16.670 per lane. We would
[9] multiply that simply by the number of lanes DMX wanted licensed
[10] and that would be your full fee starting point.
[11] **Q.** If you could turn to tab 13 in the binder, and this is
[12] Joint Exhibit 0728. If you could identify that document,
[13] please?
[14] **A.** Yes, this is the Bowling Proprietors Association of America
[15] license, BPAA license, as we like to call it.
[16] **Q.** And if you could just take a look at paragraph 4A under
[17] fees, it mentions a rate of \$11.75 per lane. Can you just
[18] explain how that gets to the rate that you proposed for DMX?
[19] **A.** Yes. If you go to paragraph 4B, directly under that, it
[20] allows for us to increase that rate each year based on the
[21] consumer price index and that's how it's grown to the \$14.40.
[22] **Q.** Were you involved in negotiating the BPAA license?
[23] **A.** No, I was not.
[24] **Q.** Who from BMI was?
[25] **A.** Cleve Murphy, who is assistant vice president of general

[1] licensing.
[2] **Q.** What happens with bowling centers who are not members of
[3] the BPAA?
[4] **A.** They can sign their own, we have a standard bowling center
[5] license which they can sign. It carries a higher rate, I think
[6] I said \$25, in that location, in that neighborhood.
[7] **Q.** And if you could take a look at tab 14 of your binder. If
[8] you could just identify this document, please.
[9] **A.** Yes, this is TV local, January 2005 percent of identified
[10] show hours containing any BMI music.
[11] **Q.** And who prepared this document?
[12] **A.** Frank Krupit.
[13] **Q.** Who is Mr. Krupit?
[14] **A.** Frank Krupit is assistant vice president at BMI.
[15] **Q.** Do you have an understanding of what source of data he used
[16] to prepare this document?
[17] **A.** Yes, I do.
[18] **Q.** What source is that?
[19] **A.** He used two sources; BMI's internal cue sheet database
[20] along with an outside source called Tribune Data, which lists
[21] every station across the country and the programming that is
[22] aired on those stations.
[23] **MR. FITZPATRICK:** Your Honor, I'd move the admission
[24] of this document.
[25] **MR. RICH:** May I have one moment, your Honor?

[1] (Pause)
[2] **MR. RICH:** No objection.
[3] **THE COURT:** Received.
[4] **Q.** So Mr. O'Neill, if you could explain the data in the table
[5] on the first page of this document and what it means?
[6] **A.** Yes. If you look at the center column, total identified
[7] show hours, those are the show hours provided to BMI from this
[8] company Tribune across the television stations. The identified
[9] show hours, the first column, identified show hours, which any
[10] BMI music would actually say do we have a cue sheet or music
[11] within that program that this company has identified. We've
[12] broken that out into overall, syndicated and local. Overall is
[13] the combination of syndicated and local. Syndicated is shows
[14] like Oprah, Wheel of Fortune or Jeopardy. Local would be local
[15] news, sports, public affairs programming.
[16] The very last column to the right, percentage of show
[17] hours with any BMI music is simply a division of the first
[18] column divided by the second column. I'm sorry, the identified
[19] show with BMI music divided by total identified show hours.
[20] **Q.** And so the numbers in the far right hand column, what do
[21] they actually represent?
[22] **A.** About 83 percent of overall identified shows contain BMI
[23] music.
[24] **Q.** And again, this is in what industry?
[25] **A.** Local TV.

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[1] Q. Do you have an understanding of why this document was
[2] prepared?
[3] A. Yes, I do.
[4] Q. Could you just explain the context for that?
[5] A. I think it's to -- I know the economists when they tried to
[6] verify the premium of what the AFBL would be both looked to the
[7] local television marketplace and the program licenses, and part
[8] of that license when it was adopted or created had a percentage
[9] of music that the typical television station played -- typical,
[10] it had a percentage of music that the typical television played
[11] of ASCAP music and that's how they originally got to this
[12] multiplier.
[13] Q. Do you have an understanding of whether the economists,
[14] whether our economists in this case used these data in
[15] calculating the premium under the television per program?
[16] A. Yes, I believe they did.
[17] Q. And if you could just explain briefly, what's the
[18] difference between the first page of this document and the
[19] second page of the document? And I direct your attention to
[20] the heading if that helps.
[21] A. The first is percent of identified show hours containing
[22] any BMI music. The second thing is TV local -- oh, one is
[23] January and the other one is the whole year.
[24] Q. Mr. O'Neill, have you ever had conversations with
[25] BMI-affiliated publishers about direct licensing?

[1] A. Yes.
[2] Q. The other entities listed on JX1293, that big tabulation?
[3] A. Was that that long spreadsheet?
[4] Q. I believe it is.
[5] A. Yes, sir.
[6] Q. Prior to that time, you had no role in licensing what we're
[7] referring to here as the commercial music service industry, is
[8] that correct?
[9] A. That is correct.
[10] Q. And so I take it you also testified that you had no
[11] involvement in the negotiations underlying the 2004 license
[12] agreement between Muzak and BMI, is that right?
[13] A. That is right.
[14] Q. And your knowledge as to those negotiations is confined to
[15] what you've learned from briefings that occurred sometime
[16] either in late 2007 or early 2008, is that right?
[17] A. That is correct.
[18] Q. So three or four years after the fact, right?
[19] A. Pretty close, yes.
[20] Q. Mr. Berenson, BMI's general counsel, was the lead
[21] negotiator in the Muzak deal, is that right?
[22] A. Mr. Berenson and Mr. Annastas, I think. Oh, Mr. Shaker
[23] also from BMI. But I believe Mr. Berenson was the lead,
[24] Mr. Rich.
[25] Q. You do believe?

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[1] A. Yes, I have.
[2] Q. Have you ever told any of them to sit tight because we're
[3] going to rate court, so don't enter into a direct license?
[4] A. No, I would never do that.
[5] Q. Have you ever discouraged any BMI affiliate from entering
[6] into a direct license?
[7] A. No, I have not.
[8] MR. FITZPATRICK: Thank you. I pass the witness, your
[9] Honor.
[10] THE COURT: Thank you, Mr. Fitzpatrick. Mr. Rich?
[11] MR. RICH: Thank you.
[12] CROSS-EXAMINATION
[13] BY MR. RICH:
[14] Q. Good afternoon, Mr. O'Neill.
[15] A. Good afternoon, Mr. Rich.
[16] Q. I believe you testified that you took on responsibility for
[17] general licensing at BMI as of April of 2006, is that correct?
[18] A. That is correct.
[19] Q. And I believe you testified that that's the licensing area
[20] that covers the licensing of entities such as DMX and Muzak,
[21] yes?
[22] A. Yes, sir.
[23] Q. TruSonic?
[24] A. Yes.
[25] Q. Play Network?

[1] A. I do believe so.
[2] Q. I think you so testified in your deposition.
[3] A. I believe -- yes.
[4] Q. He's not appearing as a witness for BMI here, is he, to
[5] your knowledge, Mr. Berenson?
[6] A. I haven't seen the witness list, but I don't think he's
[7] here today.
[8] Q. And also involved was the predecessor in your current
[9] position, Mr. Shaker, is that right?
[10] A. That's right.
[11] Q. He's no longer with BMI?
[12] A. No, he's not.
[13] Q. I believe you've mentioned both before and now Mr. Annastas
[14] was involved, is that right?
[15] A. Yes, sir.
[16] Q. He played a subordinate role in the negotiations, isn't
[17] that true?
[18] A. I think I said Mr. Berenson was the lead, so he would have
[19] been the support in that.
[20] Q. In fact, at some meetings Mr. Annastas was just an observer
[21] who wasn't doing a lot, isn't that true?
[22] A. I don't know if that's true or not.
[23] Q. If I represent to you he so testified at his deposition,
[24] you would accept that?
[25] A. I would.

[1] Q. Okay. Now, am I correct that Muzak's principal negotiator
[2] was its general counsel, Mr. Zendan, as far as you're aware?
[3] A. Yes.
[4] Q. And were you involved in the negotiation of any of the
[5] other principal CMS licenses, Music Choice, Play Network,
[6] TruSonic on which BMI relies here for its benchmarking?
[7] A. I was involved in the decision to allow Music Choice to
[8] exempt the DirectTV subscribers. That would be it.
[9] Q. What about the amendment to the TruSonic agreement about
[10] which you testified a few minutes ago which appears as tab 11
[11] in the binder on your direct?
[12] A. I would have been involved, in 2007, I would have had say
[13] over this, yes.
[14] Q. My question was, were you involved in the negotiation of
[15] what appears as JX1312?
[16] A. No.
[17] Q. Who was that?
[18] A. Tom Annastas.
[19] Q. You're sure? It wasn't Ms. Stafford Scherer?
[20] A. I know Ms. Stafford Scherer worked with Daniel O'Neill at
[21] TruSonic on some of these issues, and I also know I was
[22] involved in some discussions with Ms. Stafford Scherer and
[23] Mr. Annastas around this amendment, but I believe Mr. Annastas
[24] ultimately was the one responsible for it.
[25] Q. In other words, you didn't negotiate it, is that correct?

[1] A. No, I did not.
[2] Q. In other words you believe that all commercial music
[3] providers should be treated comparably for purposes of
[4] licensing by BMI, is that right? That's the gist of your
[5] testimony?
[6] A. I live by that similarly situated concept.
[7] Q. I take it from BMI's proposal here that the proper metric
[8] you believe for measuring comparability is on a per customer
[9] location basis?
[10] A. For this license, yes.
[11] Q. 36.36?
[12] A. Per license, yes. I mean, per location yes.
[13] Q. Is there any reason in your judgment in light of that
[14] comparability that Muzak should do better in its license
[15] dealings with BMI than DMX?
[16] A. I would offer DMX the same license that we offered Muzak
[17] and how they operated under that license over the five years,
[18] everybody was treated equally under that license. So I would
[19] say some might benefit, some might not.
[20] Q. When you say some might benefit, you believe that all CMS
[21] industry licensees are entitled to comparable economic
[22] treatment by BMI, correct?
[23] A. Yes.
[24] Q. Do you believe that Music Choice should do better in its
[25] music license dealings than DMX?

[1] A. No.
[2] Q. What about Play Network?
[3] A. No.
[4] Q. What about TruSonic?
[5] A. No.
[6] Q. I'd like to explore a bit further your understanding of the
[7] 2004 Muzak negotiations as you've come to understand those and
[8] as you've reviewed the license agreements, okay?
[9] A. Yes.
[10] Q. Now, I take it the Muzak deal was the template for all
[11] succeeding commercial music service license agreements,
[12] correct?
[13] A. That's my understanding, yes.
[14] Q. And BMI, I take it, was unwilling to vary the essential
[15] terms of that agreement as it rolled this license out to other
[16] industry players, correct?
[17] A. I believe that was correct. I think the one major change
[18] was the way the base fee was talked about in subsequent
[19] license, the CMS standard license versus the Muzak license.
[20] Q. What do you have in mind by that?
[21] A. The Muzak license was stated at \$30 million over the five
[22] years whereas the base rate on the CMS agreement was \$36.36
[23] times the number of locations times five years.
[24] Q. But if customer X came to you saying I don't like the Muzak
[25] deal, I'd like to start over and negotiate with you, I take it

[1] BMI's position is this is the license we're prepared to offer
[2] for the period of time involved, correct?
[3] A. That would be it, yes.
[4] Q. Whether you were large or whether you were small, correct?
[5] A. Correct.
[6] Q. So everybody on that long list of JX1293 entities was
[7] essentially presented with a fait accompli as far as the form,
[8] structure, fee structure of that license was concerned,
[9] correct?
[10] A. I don't know that for a fact. Again, as I testified just a
[11] second ago, I wasn't involved in that negotiation. I'm not
[12] sure if there were discussions or whether it was presented as
[13] fait accompli. I know there were adjustments made, like to
[14] Music Choice, I know there were adjustments made to TruSonic in
[15] those situations. We didn't try to just jam down that license
[16] down their throats. So there was some negotiations brought
[17] into it.
[18] Q. If a customer came to you and said I want to do a deal that
[19] gives me \$30.30 per year for the period June 2004 through, or
[20] July 2004 through June 2009, starting at \$30.30 rather than
[21] \$36.36, am I right that BMI was open to that discussion?
[22] A. I don't know at that time, Mr. Rich. I know in my time I'd
[23] like to see if there was a way, if they were differently, set
[24] up differently than the people taking the \$36.36 license, if
[25] they were operating differently, if there was something that

[1] necessitated a rate differential. Anything to avoid ending up
[2] here litigating over it. I think we would be short sighted to
[3] do so.

[4] In answering it, though, I don't know if that happened
[5] or not. I don't know if somebody came to them other than DMX
[6] who wanted the adjustable fee blanket saying they wanted a
[7] different form of license, and I think that was the main, the
[8] main person who was arguing.

[9] Q. Sitting here today putting DMX to one side, you are
[10] unaware, at least from the learning you have acquired in your
[11] current position, right, of any situation in which BMI
[12] following conclusion of the Muzak negotiation expressed a
[13] willingness to renegotiate its basic economic terms, is that
[14] correct?

[15] A. That's correct.

[16] Q. Now, Muzak and BMI executed two documents simultaneously on
[17] or about December 31 of 2004, is that correct?

[18] A. Yes.

[19] Q. And just looking back at your binder, we have them in your
[20] binder, I believe, don't we?

[21] A. I believe so. Muzak was tab 4?

[22] Q. Yes.

[23] A. I believe the side letter was tab 9.

[24] Q. And they bear the same effective date, is that correct?

[25] A. Yes.

[1] correct?

[2] A. I guess the date span was being considered, from '94
[3] through '09, I guess that might be the way to look at it, yes.

[4] Q. So the answer is yes, right?

[5] A. Yes.

[6] Q. I take it we've established that the license agreement, the
[7] portion of the unitary time span that ran from July of 2004
[8] through June 30, 2009, afforded BMI higher license fees than
[9] Muzak had theretofore been paying, correct?

[10] A. That is correct.

[11] Q. Can you identify what the gap was between what Muzak had
[12] been paying and what it agreed to pay for that period?

[13] A. I believe I said they were paying between 12 and \$14 per
[14] location on average, in that root of \$36.36 per location on a
[15] final basis.

[16] Q. A significant increment for BMI, correct?

[17] A. Yes, it probably wasn't quite where we wanted to get, but
[18] it was a step in the right direction.

[19] Q. A large jump from where it had been, correct?

[20] A. Yes.

[21] Q. And then with respect to the earlier part of this unitary
[22] time period, the part preceding July of 2004, dating back all
[23] the way to January of 1994, I take it we all agree that prior
[24] 12 to \$14 effective rate was left in place, correct?

[25] A. That's what happened, yes.

[1] Q. Tab 4 is denominated license agreement, correct?

[2] A. Correct.

[3] Q. And sets forth license terms between BMI and Muzak for the
[4] period July 1, 2004 through June of 2009, right?

[5] A. Yes.

[6] Q. And then flipping to tab 9, the letter agreement, that
[7] agreement as I believe you've already testified, finalized
[8] license agreements for the period January 1, 1994 through 2004,
[9] correct?

[10] A. Correct.

[11] Q. And the opening paragraph of that agreement which you
[12] earlier read into the record a portion of, expressly links the
[13] two as part of one unitary agreement, correct? Could you read
[14] it to yourself, that opening paragraph?

[15] A. Thank you. I believe it says that in order to resolve
[16] between them the rate proceeding. I'm not quite sure that, and
[17] correct me --I'm not quite sure the time of the rate proceeding
[18] or what date span the rate proceeding was asking to resolve,
[19] but it says we resolved that period and we also resolved the
[20] past. So if the date period of that application of AEI music
[21] went through the '09 period, then I would agree with you.

[22] Q. Let me ask the question a little differently. The
[23] resolution of both time periods, that which was the subject of
[24] the license agreement, and that which was the subject of the
[25] letter agreement, was all part of the same negotiation,

[1] Q. So you have, if you look at a unitary time period starting
[2] in January of 1994, ending in June of 2009, and if you plotted
[3] it out, you would have a fee structure level 12 to \$14 level in
[4] a general sense, if you follow me, or almost a ten-year period,
[5] yes, and then a sharp increase beginning July 1 of 2004
[6] carrying through under the current, under the license structure
[7] we've been talking about today, until June of 2009, correct?

[8] A. You can actually back that up to the original start date of
[9] '87 license that they were on, yes.

[10] Q. Now, what occurred between June 30, 2004 and July 1, 2004,
[11] that is, the last day of the finalization of the 12-to
[12] 14-dollar fees, what happened between that day and the next day
[13] when those licenses went here, that changed the fundamental
[14] value to Muzak of its license with BMI?

[15] A. Again, we were seeking a rate increase from DMX, and we
[16] felt we were being well underpaid vis-a-vis our competitor
[17] ASCAP and we were seeking to get a much closer rate, if you
[18] will, competitively. In Muzak's mind I guess we were
[19] successful in convincing them we deserved that rate.

[20] MR. RICH: Could I get an answer to my question
[21] please, your Honor?

[22] Q. I'm asking what changed in terms of the value of BMI's
[23] repertoire to Muzak between June 30, 2004, and July 1, 2004.

[24] A. I'm not Muzak. I don't know what in their minds changed.

[25] Q. Not my question. In your mind what changed?

[1] A. In our mind, we were more valuable to Muzak and we deserved
[2] a rate increase.
[3] Q. Did you become three times more valuable between June 30,
[4] 2004 and July 1, 2004?
[5] A. Did BMI become more valuable?
[6] Q. In your estimation?
[7] A. I may say I became more -- I believe, I believe BMI was
[8] seeking a rate that they felt justified, they were justified in
[9] getting, and the three times increase they felt justified in
[10] getting that rate, yes.
[11] MR. RICH: Could I try one more time, your Honor?
[12] THE COURT: No. I don't think it's a fair question.
[13] There may be many reasons why a rate changes as of a certain
[14] day, not necessarily only a change in value. And yet that's
[15] the presumption on which this argument that you're inquiring
[16] about rests.
[17] MR. RICH: It's the very point I'm trying to
[18] establish, your Honor, that there was no such change in fact.
[19] THE COURT: It doesn't matter. It wasn't done as a
[20] change in intrinsic value. It was done as what can be
[21] accomplished in a negotiation and that must inevitably take
[22] place as of some date. Now, you can ask him why that date
[23] rather than some other date, but I think the proposition on
[24] which you're resting this question is not a useful proposition,
[25] so I'm not going to allow you to try for the third time.

[1] MR. RICH: I'll move on.
[2] Q. Now, the Muzak negotiations leading up to the agreements
[3] transpired on and off for an extended period of years, isn't
[4] that true?
[5] A. Yes.
[6] Q. And it's your understanding, is it not, that from the
[7] outset of these negotiations BMI was seeking increased fees
[8] from Muzak beyond what it had been receiving on an interim
[9] basis for the entire period back to January of 1994?
[10] A. That's what I believed, yes. I'm sorry, that's what I
[11] understand, yes.
[12] Q. And this was because in BMI's view, the interim fees which
[13] dated back to a license covering the 1987, I think, to 1993
[14] period, if I'm correct, were inadequate on a going-forward
[15] basis from that point, correct?
[16] A. I believe that was our view heading into the negotiation.
[17] Q. Including because BMI's competitor ASCAP had collected
[18] significantly larger fees from Muzak for that prior period,
[19] correct?
[20] A. Yes.
[21] Q. And because --
[22] A. I'm sorry. And the fact that the industry was using more
[23] BMI music than they had previously, under previous license
[24] agreements. We felt that their use of BMI music had grown.
[25] Q. Well, you're going beyond my questions, but my next

[1] question was about to elicit the very point, which is that I
[2] take it it was BMI's view that since the amount of BMI music
[3] used by Muzak in relation to ASCAP had been increasing over
[4] time, that it would be appropriate to bridge the gap in
[5] payments beginning as of January of 2004, is that right?
[6] A. Correct.
[7] Q. And in turn, I take it it's your understanding that Muzak
[8] did not want to pay higher fees than it had paid on an interim
[9] basis for the retroactive period back to 1994, true?
[10] A. True.
[11] Q. But that it was willing to negotiate terms for higher fees
[12] on a going-forward basis?
[13] A. I know there was a fairly long period of negotiation from
[14] '94 to '98, prior to the first trial that resulted in the
[15] adjustable fee blanket. I believe BMI was seeking, as you
[16] suggested, a fee increase. I believe DMX was seeking to have
[17] their fees actually lowered or potentially have them
[18] adjusted --
[19] Q. You mean Muzak?
[20] A. Yes, thank you, I mean Muzak. Ultimately, and I
[21] apologize -- can you repeat that last question?
[22] Q. My question is, as these negotiations periodically
[23] occurred, I take it you would agree with me that at the same
[24] time Muzak at the bargaining table was resisting making
[25] increased payments for what we've been calling the retroactive

[1] period, it expressed that it was amenable to paying something
[2] more to be determined for the going-forward period?
[3] MR. FITZPATRICK: Object on foundation grounds at this
[4] point, your Honor. I think the witness clearly wasn't at the
[5] negotiating table, so I don't think he has a foundation to
[6] answer this question.
[7] MR. RICH: Your Honor, I believe my --
[8] THE COURT: I think the witness can express that in
[9] his answer, if that renders him unable to express a testimonial
[10] answer.
[11] A. I was not in the negotiation. I believe there's a lot of
[12] give and take in a negotiation, so I wouldn't assume that it
[13] didn't come into play, Mr. Rich. That probably could have
[14] happened, but I wasn't there to actually witness it.
[15] Q. Now, in fact, you do know that Muzak successfully avoided
[16] making any additional retroactive payments satisfactory to BMI
[17] on a going-forward basis, is that right?
[18] A. That is correct.
[19] Q. So the deal got done?
[20] A. The deal got done, finalized for the past. We have a new
[21] license going forward.
[22] Q. Finalized for the dollars that have been paid and the
[23] additional for the remainder?
[24] A. New dollars, if you will.
[25] Q. New, additional dollars.

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[1] A. New dollars--

[2] Q. New dollars.

[3] A. For the going forward.

[4] Q. To the extent BMI wanted on a precedential basis to focus
[5] solely on the prospective portion and tout this as a 36.36 deal
[6] to Muzak's competitors, this would not necessarily have been to
[7] Muzak's disadvantage, true?

[8] A. From Muzak's standpoint, I don't think it would have been
[9] to their disadvantage. They would have had everybody on the
[10] same rate as they were paying.

[11] Q. And Muzak, as we've established, resolved satisfactorily to
[12] itself a much longer period of years, correct? Including a
[13] period that was open retroactively, correct?

[14] A. Again, they settled the '94 through '04 period.

[15] Q. Yes?

[16] A. At what was paid, and we set the new license going forward.
[17] And that's what the whole industry ended up doing.

[18] Q. Let's review some of the basic economics of the portion of
[19] the 2004 Muzak agreement that deals with the July 1, 2004 to
[20] 2009 period, okay?

[21] A. Okay.

[22] Q. You testified, I believe, that the license calls for what
[23] is termed a base license fee or base fee of \$30 million over
[24] the five-year term, is that correct, that's the starting base
[25] fee?

[1] Q. And I take it the basis for the \$36.36 is the fact that if
[2] one were to divide the annual starting base fee of the Muzak
[3] license, namely, \$6 million, by 165,000, the number of starting
[4] locations, that's the number that would result, correct, the
[5] math would get you to \$36.36?

[6] A. That is correct.

[7] Q. But what we've covered thus far doesn't cover the entirety
[8] of the economics of that agreement, correct? There were more
[9] moving parts, as it were, yes, that could affect the ultimate
[10] fees paid?

[11] A. Because the organic -- yes, correct.

[12] Q. It incorporates an organic growth provision and several
[13] other bells and whistles, correct?

[14] A. Yes. Acquired locations, organic growth. Some others.

[15] Q. So just to be clear we're on the same page as to how that
[16] works, the license allows Muzak to add as many as 8 percent
[17] more subscribers in each year by what is defined as organic
[18] growth, without any increase in Muzak's annual fees, is that
[19] right?

[20] A. Yes, the base fee would remain unchanged.

[21] Q. And with each added subscriber up to that 8 percent
[22] allowance, the effect of per location rate would decline, is
[23] that right?

[24] A. That would be the impact of that.

[25] Q. Because the 165,000 under that scenario would be something

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[1] A. That is correct, yes. Yes, 30 million divided by time got
[2] us to the 6 million.

[3] Q. And if you ever want to refer to the document as we speak.
[4] It's not a memory test.

[5] A. Thank you.

[6] Q. And that base fee was payable in equal installments of
[7] \$6 million per annum, is that correct, over five years?

[8] A. That is correct.

[9] Q. And I take it that the license is predicated in part on a
[10] starting subscription location count of 165,000 locations as of
[11] December 31, 2003, is that a correct reading of it?

[12] A. That is. Correct.

[13] Q. And I take it in this proceeding, BMI seeks a license fee
[14] from DMX predicated on the assumption, tell me if I'm wrong,
[15] that the 2004 Muzak deal was one calling for payment by Muzak
[16] of \$36.36 per subscriber location, correct?

[17] A. I'm sorry I missed the last --

[18] Q. Am I correct that the predicate for the fee that you seek
[19] here, before we talk about option value premiums, is based on a
[20] base rate of \$36.36 a location, correct?

[21] A. Well, actually -- yes, that is correct, because I think the
[22] contract itself would be, would be a disadvantage to DMX.
[23] Because they lost subscribers.

[24] Q. I didn't ask you reasons. I asked if that's correct.

[25] A. Yes, that's correct.

[1] larger, so a larger divisor would be -- a larger number would
[2] be divided into the \$6 million, is that correct?

[3] A. That is correct and the effective rate would drop. But it
[4] would drop with a floor. It couldn't -- the 36.36 cannot fall
[5] lower than 8 percent per year.

[6] Q. Per year, okay. Could we put back up on the screen what
[7] was the first demonstrative from the opening, please? That's
[8] basically a correct depiction as you understand it, I take it,
[9] of what those maximum sort of year-to-year per location fee
[10] benefits would be, assuming 8 percent or greater growth, is
[11] that correct?

[12] MR. FITZPATRICK: Just object and want to be clear
[13] we're talking about the numbers and not any other part of the
[14] slide. If we're asking Mr. O'Neill to adopt the accuracy of
[15] the whole slide, I just want that to be clear in the question.

[16] MR. RICH: I welcome any aspect of that that he feels
[17] is an inaccurate depiction of the manner in which the math
[18] under the Muzak license works.

[19] THE COURT: What is your objection?

[20] MR. FITZPATRICK: It's unclear to me whether Mr. Rich
[21] was asking Mr. O'Neill whether he adopted that these were
[22] actually contemplated per location rates or whether he was just
[23] asking Mr. O'Neill to confirm that the math does work out that
[24] way. It wasn't clear to me in the question and to me they'd be
[25] two different questions.

[1] **THE COURT:** Can we operate on the basis that this
[2] exhibit is an accurate representation of what would happen if
[3] the underlying facts supported it?

[4] **MR. FITZPATRICK:** If there was 8 percent growth or
[5] more, yes, that's agreed between the parties, your Honor.

[6] **BY MR. RICH:**

[7] **Q.** So we're in agreement on that, yes?

[8] **A.** Yes.

[9] **Q.** And I take it you testified on direct, as you did at your
[10] deposition, that this was viewed by BMI as a form of a built-in
[11] cushion to allow Muzak to experience a certain level of growth
[12] annually without sustaining any fee increase, correct?

[13] **THE COURT:** Without sustaining -- oh, yes, any fee
[14] increase.

[15] **A.** Yes, without having to add any money to the base fee they
[16] could grow up to 8 percent in customer locations.

[17] **Q.** So assuming during the first year of the license Muzak had
[18] grown by a full 8 percent, I take it the mathematical result of
[19] dividing the 8 percent larger subscriber base by that unchanged
[20] annual fee would have been to reduce the effective per location
[21] fee at the end of the first year from \$36.36 to what you see on
[22] the depiction, which is \$33.67, correct? I'm not asking you to
[23] do the math, but you can assume I've done it.

[24] **A.** That is correct, Mr. Rich.

[25] **Q.** Then for each year on the same assumptions, had they come

[1] contract, yes, that would have been correct.

[2] **Q.** And you believe the terms of the Muzak agreement terms are
[3] reasonable ones, correct?

[4] **A.** Yes, I do.

[5] **Q.** And were reasonable at the time the deal was entered into,
[6] right?

[7] **A.** Yes, I do.

[8] **Q.** And viewing as you do DMX to be a similarly situated
[9] licensee to Muzak, you're prepared to accord and afford DMX the
[10] same economic terms as BMI regarded to be reasonable to Muzak,
[11] correct?

[12] **A.** Correct.

[13] **THE COURT:** What was the predicate of that question?

[14] **MR. RICH:** That BMI regards the --

[15] **THE COURT:** That was the conclusion. Could you read
[16] back the question?

[17] (Record read)

[18] **Q.** Now, following entering the Muzak deal in 2004, sir, BMI
[19] entered into deals with several of the other larger commercial
[20] industry music competitors, correct?

[21] **A.** Yes.

[22] **Q.** These included Play Network?

[23] **A.** Yes.

[24] **Q.** And Music Choice?

[25] **A.** Yes.

[1] to pass, take your counsel's concern, I'm not saying they did,
[2] or they were anticipated to for purposes of this, but
[3] mathematically had that happened, the effective rates would
[4] have scaled down as per this document, correct?

[5] **A.** Yes.

[6] **Q.** Now, the Muzak agreement as you understand it also sets
[7] forth the fee consequences were Muzak to acquire another
[8] commercial music service that was not operating under its own
[9] final license agreement with BMI, correct?

[10] **A.** That's correct.

[11] **Q.** You also touched on that with Mr. Fitzpatrick during your
[12] direct, right?

[13] **A.** Yes.

[14] **Q.** And do you recall discussing this kind of scenario as well
[15] in your deposition with my partner, Mr. Marks?

[16] **A.** Yes, Mr. Marks was very helpful in taking me through the
[17] examples.

[18] **Q.** Yes, I was hoping you would say that so we could short
[19] circuit the same elaborate gymnastics here. I take it it's the
[20] case, is it not, that had Muzak acquired our client, DMX during
[21] the last year of the Muzak license -- can we keep that chart
[22] up, please -- the per location rate that Muzak would have paid
[23] in acquiring each of those DMX locations would have been
[24] \$24.75?

[25] **A.** On a going-forward, I mean, for the last year of the

[1] **Q.** And TruSonic?

[2] **A.** Yes.

[3] **Q.** These are the among the other larger competitors?

[4] **A.** Yes.

[5] **Q.** Now, let's talk about the Play Network for a moment. I'm
[6] not sure the Play Network agreement is in the binder. I
[7] thought I saw TruSonic or that might have been -- why don't we
[8] show you and hand you the document that's been premarked as
[9] JX0095.?

[10] **MR. RICH:** With your Honor's permission can we hand it
[11] to the Court and the witness?

[12] **Q.** Have you seen this document before, sir?

[13] **A.** Yes, I have.

[14] **Q.** Do you recognize this to be the license agreement entered
[15] into on or about June 16, 2005 between BMI and an entity called
[16] Play Network?

[17] **A.** Yes, I am.

[18] **Q.** And Play Network is a participant, a business operating in
[19] the commercial music service environment.

[20] **A.** Yes, they are.

[21] **Q.** Am I correct that this agreement is structured the same way
[22] as the Muzak agreement is?

[23] **A.** Yes, it is.

[24] **Q.** Calling for or allowing an 8 percent per annum organic
[25] growth allowance without any increase in fee for Play Network?

[1] A. Yes, sir.

[2] Q. And it's the case, is it not, that Play Network has in fact

[3] experienced growth exceeding 8 percent during all of the years

[4] of the contract?

[5] A. Yes, they have.

[6] Q. -- to your knowledge.

[7] And I want to do a bit of an extraction from JX1293,

[8] that's that very large document, your Honor, that is folded up

[9] here in the binder at tab 5 of the materials that Mr.

[10] Fitzpatrick walked the witness through, and we're just going to

[11] extract out here -- I'm sorry, we're going to do a

[12] demonstrative instead. Can we pull out from 1293 the lines for

[13] each year for Play Network? I'm advised they already appear in

[14] yellow form. Yes, they are, so anticipating my cross here,

[15] counsel was kind enough, I think, to yellow line those, but we

[16] tried to -- were we able to put them on a -- it's easier to

[17] look in one place. Why don't we instead of holding up the

[18] examination, I'll represent to you that on this demonstrative

[19] that you have been just handed we have extracted from JX1293

[20] the effective yearly per location rates generated by the growth

[21] experienced by Play Network, so that's the first row of entries

[22] on this. Do you see that?

[23] A. Yes, I do.

[24] Q. I'll represent to you those are accurate, okay? And is it

[25] also not the case, sir, to your knowledge, that even as of the

[1] Q. And scooting to the end here, I take it based on BMI's own

[2] data analysis that by the last year of the license, the

[3] effective per location rate that was being paid by Play Network

[4] was at \$24.75, that's consistent with your knowledge and

[5] understanding, correct?

[6] A. Yes, it is.

[7] Q. And you regard the Play Network deal to be a reasonable

[8] one, correct?

[9] A. Yes, I do.

[10] Q. And you would -- BMI recognizes that DMX is entitled to a

[11] license on comparable economic terms to that afforded to Play

[12] Network, correct?

[13] A. I believe that DMX should be afforded the same exact

[14] license agreement as Play Networks.

[15] Q. Now we turn to Music Choice. Am I correct that the most

[16] recent agreement, final agreement entered into between BMI and

[17] Music Choice occurred sometime in 2006?

[18] A. I don't have the Music Choice agreement in front of me.

[19] MR. RICH: Let's show the witness JX1310, please?

[20] A. I'm sorry, Mr. Rich, that is correct. That is correct.

[21] Q. I know there are a lot of dates flying by. We'll provide

[22] that document now to you.

[23] Now, am I correct that although featured at one

[24] document, what we have here is turning to the second page, the

[25] first numbered page, the document styled BMI Music Choice

[1] date this license, JX0095 was executed, which was in or about

[2] June of 2005, it's your understanding, is it not, that even

[3] prior to the time the license was signed, BMI recognized and

[4] understood that the effective per location rate for the first

[5] year would be less than \$36.36?

[6] A. With Play Networks, yes, we did.

[7] Q. Indeed it would be at about \$33.67?

[8] A. Because of their growth yes.

[9] Q. Yes, prior to the actual execution of the agreement,

[10] correct?

[11] A. Yes.

[12] Q. And so at least as to Play Network, this never was a 36.36

[13] per location agreement, was it?

[14] A. I don't know if that's the case, if they were communicated

[15] prior to 2005 of what the license was. It may have been at the

[16] time that they believed it was 36, but when they first heard of

[17] this new license that BMI was offering.

[18] Q. Let me be more precise with my question. At the time Play

[19] Network signed this license in June of 2005, it knew and

[20] understood, as did BMI that this was not a 36.36 license, even

[21] as of year one, correct?

[22] A. The effective rate for Play Networks was going to be less

[23] than 36.36.

[24] Q. Indeed would be \$33.67, correct?

[25] A. That is correct.

[1] confidential settlement and release agreement dated June 27,

[2] 2006, yes?

[3] A. Yes, sir.

[4] Q. And then if you flip in to Bates page 1010166, perhaps a

[5] little more than halfway through.

[6] A. There we are.

[7] Q. There is a document attached to it styled commercial music

[8] service license agreement.

[9] A. Correct.

[10] Q. Bearing the same date, is that correct?

[11] A. Yes, sir.

[12] Q. So I take it that the license agreement entered into

[13] between BMI and Music Choice in the middle of 2006 was part and

[14] parcel of a larger settlement agreement, is that correct?

[15] A. Yes. Yes, it was.

[16] Q. And the license agreement generated new license fees for

[17] the period July 1, 2004 through June 30 of 2009 no differently

[18] and at the same structure as the Muzak deal, correct?

[19] A. Correct.

[20] Q. And simultaneously, the settlement agreement which appears

[21] at the front of this document, settled a retroactive period

[22] covering January of 1994 to June 30, 2004?

[23] A. I'm seeing July 2004, whereas -- I'm sorry, Mr. Rich, I'm

[24] not -- let me just take a quick gander.

[25] Q. Please. Take your time.